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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 786

J. F. BARNES,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

HARRIS A. GILBERT,
1310 Nashville Bank & Trust Building,
Nashville, Tennessee,

JACK NORMAN, SR.,
213 Third Avenue, North,
Nashville, Tennessee,

Attorneys for Petitioner.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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To the United States Court of Appeals for the Sixth Circuit.

Petitioner, J. F. Barnes, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on October 7, 1967.

OPINIONS BELOW.

The United States District Court for the Middle District of Tennessee did not render an opinion. The opinion of the Court of Appeals is not yet reported, but is attached to this statement as Appendix "A".

JURISDICTION.

The judgment of the Court of Appeals affirming, in part, the conviction of this defendant below was entered on October 7, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED.

Constitutional Provisions: Amendment V to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

18 § 1952, United States Code, provides:

"Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury. Added Pub. L. 87-228, § 1 (a), Sept. 13, 1961, 75 Stat. 498, amended Pub. L. 89-68, July 7, 1965, 79 Stat. 212."

QUESTIONS PRESENTED.

1. Whether Title 18, U. S. C., Section 1952, the Interstate Travel Act, violates the Fifth Amendment to the Constitution of the United States?

2. Whether it was prejudicial error or harmless beyond a reasonable doubt for (a) the United States Attorney, in his jury argument, to refer to the failure of the defendant to testify in his own behalf, when considered with (b) the failure of the trial judge to grant a mistrial after prejudicial newspaper and television accounts of trial proceedings, not in evidence, were read or heard during the trial by three jurors?

STATEMENT.

On March 10, 1965, a seventeen count indictment was filed in the United States District Court for the Middle District of Tennessee, Nashville Division, charging the defendant, J. F. Barnes, and his co-defendants, James Tubb Washer and Robert Carney, with violations of Title 18, U. S. C., Sections 1952 (the Interstate Travel Act), 371 and 272, for using and willfully causing others to use

facilities of interstate commerce with the intent to carry on a business enterprise in violation of the Tennessee gambling laws. The first count was a conspiracy count and the other sixteen counts alleged substantive offenses.

Upon pleas of not guilty and trial by a jury, the defendants were found not guilty on six counts and guilty on eleven counts. The defendants were sentenced to two years imprisonment and $2,000.00 fine on each count, the sentences to run concurrently.

The Court of Appeals set aside the conviction of petitioner on the conspiracy count and entered a judgment of acquittal. The judgment of the Court of Appeals affirming the conviction of petitioner on all substantive counts was entered on October 7, 1967. The judgment of the Court of Appeals set aside the conviction of his co-defendants on all counts with directions to enter a judgment of acquittal for them. The mandate of the Court of Appeals having been stayed, this defendant remains released upon his bond pending this petition.

The substantive counts of the indictment, for which petitioner still stands convicted, charge that the defendant, at various times in the year 1964, did cause certain quantities of dice to be sent from Chicago, Illinois, and Cincinnati, Ohio, to Nashville, Tennessee, to be used in a gambling enterprise operated by defendant in violation of the law of Tennessee, and that the defendant willfully caused a Nashville, Tennessee, bank to place in the United States mails for collection, two checks drawn on out-of-state banks, the proceeds of which were used to promote the gambling enterprise. The checks were for the sums of $200.00 and $50.00. There was substantial and material proof of the charges. The defendant did not take the witness stand or put on proof.

THE QUESTIONS ARE SUBSTANTIAL.

The constitutionality of Title 18, Section 1952, U. S. C., has not been decided by this Court. The following Circuit Courts of Appeal have upheld its constitutionality:

Marshall v. U. S., C. A. Cal., 1966, 355 F. 2d 999;
U. S. v. Zizzo, C. A. Ind., 1964, 338 F. 2d 577, certiorari denied 85 S. Ct. 1530, 381 U. S. 915, 14 L. Ed. 2d 435;
Turf Center, Inc. v. U. S., C. A. Wash., 1963, 325 F. 2d 793;
Bass v. U. S., C. A. Ark., 1963, 324 F. 2d 168;
Compton v. U. S., C. A. Tenn., 365 F. 2d 1-3.

The language of the Act is so susceptible of questionable meaning and the effects of the Act are so far reaching that consideration of the constitutionality of the Act is warranted.

The argument of the prosecutor that the defendant did not call a witness, when coupled with the highly inflammatory newspaper account of proposed government proof, hereinafter described in detail, prejudiced the substantial rights of the defendant Barnes, and they were so serious that they should not be deemed harmless.

Stewart v. United States, 366 U. S. 1;
Marshall v. United States, 355 F. 2d 999;
Shepard v. Maxwell, 384 U. S. 333.

Question No. 1.

Whether Title 18, U. S. C., Section 1952, the Interstate Travel Act, violates the Fifth Amendment to the Constitution of the United States?

(a) The statutory language used in the Act is broad, uncertain, ague and indefinite and does not sufficiently warn the defendant as to the prohibited conduct.

(b) That the Act constitutes a reasonable and indiscriminate restriction of the right to travel and thereby breaches the freedom of travel.

(a) In **Connally v. General Construction Co.**, 269 U. S. 385, 70 L. Ed. 322, 46 S. Ct. 126 (1926), the Court stated:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law (citation omitted)."

70 L. Ed. 328.

In the case of **United States v. Cardiff**, 344 U. S. 174, 97 L. Ed. 200, 73 S. Ct. 189 (1952), the Court struck down a section of the Federal Food, Drug and Cosmetic Act (21 U. S. C. 331) because the criminal provision, when read with reference to the entire statute, was capable of two or more possible meanings, the Court, again citing the **Connally** opinion, supra, stated at p. 202 of the L. Ed. report:

> "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague, and fluid (e. g., United States v. Cohen Grocery Co., 255 U. S. 81) may be as much of a trap for the innocent as the ancient laws of Caligula."

The statute may be divided into four elements required for conviction: (1) Any use of interstate or foreign fa-

cility with the intent (2) to facilitate the promotion, management, establishment, or carrying on (3) of any business enterprise involving (4) gambling.

Although the terms of Paragraph A of the Act are vague, the real trap for the innocent is in Paragraph B. The crux of the Act is that the use of interstate facilities shall be used to commit an unlawful activity defined as ". . . any business enterprise involving gambling . . .". A man of common intelligence would conclude that the language of the Act applied only to a gambling business such as the word "enterprise" is so defined in most standard dictionaries. Confirming this, the **caption** of the Act indicates that the Act is to be applied to a "racketeering enterprise", which was the original object of the Act, and that the Act applies to rackets conducted or organized syndicates whose influence extend from state to state. (See Legislative History, 1961, U. S. C. Cong. and Adm. News, p. 266, letter of Robert F. Kennedy, Attorney General.)

However, the scope of the Act, as held in numerous district court cases, is far more reaching than the caption. The construction now generally placed upon the Act is that if any individual should embark upon a course of conduct whereby he uses the facilities of interstate commerce to facilitate the carrying on of gambling in violation of a state law, such activity is in violation of the Act. See the discussion of same by Judge Talbot Smith in **U. S. v. Azar**, 243 F. Supp. 345, 347-8, E. D. Mich., 1964. The Act is being used primarily for the suppression of petty local gambling activities, which often have only slight interstate facility connections. The terms "business enterprise" and "involving gambling" are so vague that a man of common intelligence must guess at their meaning. Furthermore, the words are capable of two or more meanings. If a church regularly conducted a bingo game on its premises and should purchase bingo cards from a source outside of the state, apparently, this

would involve gambling in violation of most state laws and would probably subject the church officials to indictment under the Interstate Travel Act.

(b) In **Aptheker v. Secretary of State**, 378 U. S. 500, 12 L. Ed. 2d 992, 84 S. Ct. 1959, the Court found that Section 6 of the Subversive Activities Control Act indiscriminatorily violated the "freedom of travel" which the Court deemed "a constitutional liberty closely related to the rights of free speech and association" protected by the Fifth Amendment (378 U. S. 517).

The Interstate Travel Act allows a citizen of Nevada to travel to Chicago, Illinois, to purchase dice, and take them back to Nevada for gambling use, while the defendant Barnes could not travel to Chicago, Illinois, to purchase dice or have same shipped to him if they were to be used in Tennessee. Numerous examples of the conflicting state laws relating to gambling activities such as pari-mutuel horse and dog track betting, state-wide lotteries, poker houses, bingo games, etc., can be cited as examples of gambling activity that may be lawful from state to state. Congress has said that a citizen may travel from one state to another to purchase any material useful in gambling so long as it does not violate the laws of the state to which it is taken for use. If the state should have a law prohibiting its use, and the traveler should attempt to so use it unlawfully, then the facilities of interstate commerce and freedom of travel are blocked to that individual.

It is submitted this type of travel control constitutes an indiscriminate denial of freedom of travel. Most of the lower court opinions sustaining the constitutionality of the statute have relied primarily upon **Clark Distillery v. Western Maryland Railroad**, 242 U. S. 311. It is requested that the holding in the **Clark** case be reviewed.

Question No. 2.

Whether it was prejudicial error or harmless beyond a reasonable doubt for (a) the United States Attorney, in his jury argument, to refer to the failure of the defendant to testify in his own behalf, when considered with (b) the failure of the trial judge to grant a mistrial after prejudicial newspaper and television accounts of trial proceedings, not in evidence, were read or heard during the trial by three jurors?

In **Chapman v. California,** 386 U. S. 18, 24, the Court reversed a state court conviction based on the prosecutor's argument commenting on the failure of the defendant to take the witness stand. The Court held:

> "We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be harmless, the Court must be able to declare and believe that it was harmless beyond a reasonable doubt."

In the case at bar, the prosecutor made the following comment in the argument to the jury:

> "Mr. Neal: . . . There's not much reason for the government in this case to argue at great lengths. Now the defense counsel may argue at great lengths, because they rested, of course, without calling a witness, but——
>
> Mr. Norman: Except to that if Your Honor please.
>
> The Court: What was that?
>
> Mr. Neal: I say the defendants may argue at great lengths because they rested without calling a witness.
>
> Mr. Hooker: Object to that and move for a mistrial."

The trial judge instructed the jury to disregard the argument, denied the motion for a mistrial, and later in

his final instructions, instructed the jury again on the subject.

The night before, an account of the trial was run in the Nashville, Tennessee, afternoon newspaper which is adequately described in the opinion of the Court of Appeals below. This publicity, together with further publicity, was read or heard by at least three jurors, who stated that same would not influence their verdict. Same is printed as Appendix B hereto. Obviously, the publicity concerned inflammatory matters which were not introduced in the proof. The trial court had stated, out of the presence of the jury, that the proof sought to be introduced by the Government "might be pretty prejudicial" (Tr. 206), and the Government had withdrawn the proffered testimony, yet three jurors were exposed to this material, and a mistrial was denied.

The errors stated are sufficient to warrant a hearing and reversal of the judgment by this Court.

The comment of the prosecutor was barred by 18 U. S. C. 3481. The decision of the Court in **Stewart v. United States,** 366 U. S. 1, is applicable.

In Stewart v. United States, the Court stated:

> "The Fifth Amendment to the United States Constitution provides in unequivocal terms that no person may 'be compelled in any criminal case to be a witness against himself.' To protect this right Congress has declared that the failure of a defendant to testify in his own defense 'shall not create any presumption against him.' Ordinarily, the effectuation of this protection is a relatively simple matter—if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted."
>
> **Stewart v. United States,** U. S. C., 366 U. S. 2.

"For, in its argument regarding the possibility that the jury may not have been aware of the improper question, the Government stresses the fact that the question was not emphasized by any reference to it in the instructions to the Jury; During the course of this argument the Government expressly recognizes that the danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's prior failures to testify. Plainly, the defense was under no obligation to take such a risk. The motion for a mistrial was entirely appropriate and indeed, necessary to protect the interests of petitioner."

Stewart v. United States, U. S. C., 366 U. S. 10.

In regard to the prejudicial publicity, it is submitted that **Marshall v. United States**, 360 U. S. 310, is controlling, and that **Shepard v. Maxwell**, 384 U. S. 333, is applicable.

In the **Marshall** case, the Court set aside a Federal District Court conviction where the jurors were exposed through news accounts to information that was not admitted at trial. The Court held that the prejudice from news accounts "may be indeed greater" than when it is part of the prosecution's evidence "for then it is not tempered by protective procedures", 360 U. S. 313. Defendants do not have the benefit of the great constitutional protections and guaranties in combating news articles read during trial. The Court further felt that it was not dispositive of the case that each juror who had read the news articles had stated: '. . . he would not be influenced by the news articles, that he could decide the case only on the evidence of record and that he felt no prejudice against the petitioner as a result of the articles". 360 U. S. 312.

In the **Marshall** case, it is stated:

> "We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence."
>
> 360 U. S. 312-3.

In the case at bar, the trial judge had commented that the evidence proffered might be pretty prejudicial, but the jurors who had read or heard of it were allowed to remain on the jury, and defense counsel could never remove the stain.

In the **Marshall** case, it appears from the Court of Appeals opinion and the opinion of this Court, that there was substantial and material proof of the guilt of the defendant, that the defendant did not take the witness stand, nor did he offer any evidence. The same is true here. In the case at bar, it is said that the guilt of Barnes is so evident that the errors complained of could not have affected the verdict and the errors were harmless.

We submit the jury must have been swayed by the news accounts, which had sinister overtones. As stated by former solicitor general Archibald Cox:

> "If inadmissible evidence damaging to the defendant has been revealed, nothing said in his favor is likely to remedy the situation, just as the wrongful admission of evidence against him during the trial itself could not be cured by letting him introduce improper evidence of his own. Similarly, if newspapers published evidence which, though admissible is not in fact introduced against the defendant at trial, he is deprived of his right to confront and examine hos-

tile witnesses under oath, and the defect will not be remedied by letting him make his own counter-accusations."

80 Harvard Law Review 182-183.

The judicial basis for his statement is **Turner v. Louisiana**, where the Court stated:

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's rights of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guaranties of trial by jury."

379 U. S. 466.

We submit the errors committed at the trial are sufficient to warrant a reversal and a new trial.

Respectfully submitted,

.....

HARRIS A. GILBERT,
Thirteenth Floor,
Nashville Bank & Trust Building,
Nashville, Tennessee,

.....

JACK NORMAN, SR.,
213 Third Avenue, North,
Nashville, Tennessee,
Attorneys for Petitioner.

APPENDIX A.

(Filed Oct. 7, 1967, Carl W. Reuss, Clerk.)

No. 17181,
United States Court of Appeals for the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
v.
J. F. Barnes, James Tubb Washer and Robert Carney,
Defendants-Appellants.

Appeal from the U. S. District Court for the Middle District of Tennessee.

Decided October 7, 1967.

Before O'Sullivan, Edwards and McCree, Circuit Judges.

O'Sullivan, Circuit Judge. Defendants-appellants, J. F. Barnes, James Tubb Washer and Robert Carney, were, as partners, the proprietors of a Nashville, Tennessee, gambling establishment known as the Uptown Dinner Club. This enterprise was conducted for years in violation of Tennessee's antigambling laws, Tenn. Code Ann., Section 39.2032, but seemingly flourished unhampered by prosecution until the federal government indicted the coproprietors under the so-called Interstate Travel Act, 18 U. S. C. A., Section 1952.[1] The misconduct charged in the indictment

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[1] 18 U. S. C. A., Section 1952 reads in part:

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

* * * * * * *

(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on, of any

consisted of entering into a conspiracy (18 U. S. C., Section 371) to use, and causing to be used facilities of interstate commerce—common carriers and the mails—to carry on and promote the operation of the Uptown gambling establishment; the "overt acts" cited by the Government as establishing the conspiracy and the charged substantive violations of the Travel Act were: (a) purchasing various quantities of dice and chips from Chicago and Cincinnati concerns and having them shipped to Nashville by express, and (b) cashing checks drawn on out-of-state banks and causing a Nashville bank to use the mails to deliver them, for collection, to the outstate drawee banks.[2] By jury verdict, returned November 23, 1965, all defendants were convicted under various counts of the indictment. Their appeal is now before us.

We discuss the claims of error as follows:

I. Convictions of Washer and Carney on conspiracy and substantive counts.

The first count of the indictment charged the defendants with conspiring, from about October 1, 1961 to December 31, 1964, to commit the substantive offenses detailed in counts two through seventeen. Motions of appellants Washer and Carney for judgments of acquittal on all counts were denied. The jury convicted the three defend-

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unlawful activity, * * * shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling . . . offenses in violation of the laws of the State in which they are committed. . ."

[2] While the described conduct does not indicate that the proprietors of the Uptown Club were a part of the interstate octopus of "organized crime" or members of the "Syndicate," the destruction of which was the objective of the Travel Act (see Judge Talbot Smith's discussion of its legislative history, *United States v. Azar*, 243 F. Supp. 345, 347-348 (E. D. Mich. 1964)), the defendants could be found guilty if their doings were condemned by the letter of the Act.

ants on the conspiracy count, the substantive counts relating to the purchase of dice and on two of the counts involving the cashing of checks; it acquitted all defendants on the counts involving the purchase of chips and of three of five counts involving the cashing of checks. The reason for this selectivity by the jury does not readily appear unless it be that they considered chips less identifiable with gambling than dice and because it was not clear whether three of the checks were cashed to cover gambling losses. We are of the view that the motions of Washer and Carney should have been granted.

a. Purchase of chips and dice.

None of the defendants took the stand or offered any proofs. The government's evidence established that over the period in question, and as far back as 1952, the defendants, as partners, carried on a gambling establishment in violation of Tennessee law. Testimony as to the method of the Uptown Club's operation was given by various of its former employees, all local residents in the Nashville area. They agreed that Barnes was the active manager of the business, but that Washer and Carney were in and out of the club and took over for Barnes in his absence; Carney also had an apartment upstairs of the club where he stayed on occasion.

It was further established that the managing partner, Barnes, had on various dates in 1964 purchased quantities of dice and chips from business houses in Chicago and Cincinnati. But there was no evidence that Carney or Washer had anything to do with, or had any knowledge of, Barnes' outstate purchases of these items. Representatives of the Chicago and Cincinnati firms testified that all the orders for the gambling paraphernalia were placed with them by Barnes, that the shipments were made to Barnes via Railway Express, and that their accounts were

paid by him; they claimed they did not know his partners, Washer and Carney.

There was no evidence that a practice of outstate purchasing had existed prior to February 29, 1964, the first such purchase cited in the indictment. And although a large number of dice and chips were acquired subsequently in 1964, there was no evidence that the involved shipments made up the club's supply of these items. There was nothing to tell whether some of them were resold at retail or otherwise or were taken as souvenirs by the patrons of the club. There was no evidence of any need for Barnes to go out of Tennessee to purchase dice and chips, and it is a reasonable assumption that the state of Tennessee has an ample supply of such devices for sale.

Although the government apparently had access to the books and other records of the partnership, with which Washer and Carney could be assumed to have been familiar, none that were introduced disclosed the interstate character of any shipments of dice or chips. Partnership income tax returns of the Uptown Club (prepared by an accountant and signed only by Barnes) for the years 1963 and 1964 were introduced, and showed the 1963 net income of the club to be $164,816.00, each partner's share being $55,000.00; in 1964 the share of each partner was approximately $16,000.00. But these returns, while giving an impression of the size of the operation, again, provided no proof as to the alleged use of interstate facilities by Carney and Washer, or knowledge or expectation by them of Barnes' outstate purchases.

b. Cashing of checks.

The government charged that the defendants were guilty of violating the Travel Act, and conspiring to violate it, by cashing patrons' checks, drawn on outstate banks, and having the First American National Bank of Nashville

use the mails to effectuate collections from the drawee banks. The checks involved in the two counts upon which convictions were obtained totaled $250.00. We assume that the evidence introduced in this respect also contributed to the conviction of the defendants on the conspiracy charge.

Patrons of the Uptown Club from time to time cashed checks at the club. Club employees stated, however, that before any check could be accepted, it had to have the approval of one of the three partners. Although there was testimony that Washer and Carney did on occasion handle customers' checks, there was no evidence that either of them had approved or cashed the particular checks cited in the indictment, or any other outstate checks; nor was there any evidence that either of them delivered any such checks to the Nashville bank for collection. Only Barnes' name appears on them, as an endorser, and it may be assumed from that he was the party who cashed them.

The five transactions involving checks were confined to the month of November, 1964. There was no testimony as to the approximate percentage of patrons frequenting the club who resided outside the state of Tennessee and hence might be expected to cover gambling losses with checks drawn on out of state banks. It was stipulated that appellants Washer and Barnes had for some years maintained a joint savings account at the First American National Bank at Nashville to facilitate the cashing of checks brought there from the Uptown Club; that any checks returned for insufficient funds were to be charged against the account. It was also stipulated, however, that there had "been nothing charged against it."

c. Discussion of evidence.

We do not believe, considering the above, that the government met its burden of offering evidence from which

a jury could find beyond a reasonable doubt that Carney and Washer conspired with Barnes, or were either principals or aiders and abettors with him in his purchasing gambling paraphernalia from outstate sources, or in employing interstate facilities to cash the checks drawn on out of state banks.

It is apparent, of course, that all of the defendants were active partners in carrying on an enterprise which violated the criminal statutes of Tennessee, but such criminal conduct was but necessary background to the federal offenses for which they were tried. Federal crimes were what the government had to establish.

In its attempt to support the conviction on the conspiracy count the government says to us that an agreement to use interstate facilities need not be overt, but may be inferred from circumstantial evidence. The government points out that the defendants had been closely associated with each other in the gambling business for years, and asserts that it would be naive to suppose that Washer and Carney did not know of, and had not agreed to, Barnes' use of interstate facilities in connection with the enterprise; it insists that in a business on the scale of the Uptown Club, it was inherently improbable that interstate facilities would not be used to acquire supplies and to cash checks. This approach is also used by the government in asking affirmance of convictions on the substantive counts as well:

> "The defendants' argument that there was insufficient evidence to convict defendants Washer and Carney on the substantive counts of the indictment overlooks the basic fact of the case; all of the defendants were partners in the conduct of a gambling business in violation of state law and in the operation of which interstate facilities were used. Theirs was not only a partnership in business; *it was a partnership in crime,*

and defendants Washer and Carney were not aiders and abettors, as contended by defendants, but co-conspirators." (Emphasis supplied.)

We may assume that if the purchase of supplies through interstate commerce, or the cashing of checks by use of a facility of interstate commerce, were essential to or shown to be usual in the business of a local gambling enterprise, or if Carney and Washer had reason to expect or knew that the partnership manager was so employing facilities of interstate commerce, they could be found guilty. This would be true, as the government says, without direct evidence, if there was circumstantial evidence from which an inference of the requisite facts could be made, and on this appeal the government's evidence and inferences therefrom must be viewed most favorably to it. *Glasser v. United States*, 315 U. S. 60, 80, 88 L. Ed. 680, 704 (1942). But the inferences must be justifiable ones, and mere suspicion that Washer and Carney must have known, or reasonably could have been expected to know, about Barnes' conduct will not suffice. *Cf. United States v. Berkley*, 288 F. (2) 713 (C. A. 6, 1961), *cert. den.* 368 U. S. 822.

The purchase of paraphernalia in order to run an illegal gambling establishment is not on its face a federal offense. Undoubtedly supplies were available in Tennessee, and the mere knowledge by Carney and Washer that Barnes was acquiring dice and chips for use in the club did not also charge them with knowledge that he was bringing them in from outstate. He made all the purchases in his own name, and the sellers involved in the transactions had never heard of the other partners. Nothing appeared in the partnership records introduced by the government which would put Washer and Carney on notice that some of the club's equipment was being acquired from some-place outside Tennessee.

Similarly as to the checks drawn on out of state banks. We may assume that the Uptown Club on occasion enjoyed the patronage of outstate visitors to Nashville, and that many who buy food and drink and join in the gambling at such a spot have need to cash checks. It might be surmised, also, that Carney and Washer cashed some outstate checks while they were in charge, but there was no such proof. There was no evidence that it was part of the normal operation of such an enterprise as the Uptown Club to cash outstate checks. Therefore, this had to be inferred without proof. There was no evidence that Carney or Washer knew of the cashing of the two checks by Barnes for which they, with him, were convicted. This, therefore, also had to be inferred.

The joint savings account maintained by Washer and Barnes (not the partnership) to protect the bank against bad checks, adds nothing of probative worth to the government's case. It was begun in 1951, long before the Travel Act became law. Its beginning did not offend any federal statute and could not have been any part of a conspiracy to violate the Travel Act, or any other federal statute. From its beginning in 1951, "there's been nothing charged against it."

The Federal Travel Act, enacted in 1961, was a relatively new effort by the federal government to attack interstate gambling where local authorities failed to act. Assuming that Washer and Carney knew of the Act and that cashing outstate checks would violate it, they could have avoided doing so themselves and forbidden Barnes to do so; but he could possibly have acted contrary to their instructions. This is, of course, also surmise. There is no evidence that any of the partners knew that the Travel Act could make a local enterprise a federal offense by the mere cashing of an outstate check, whether for food and drink partaken at the club or for gambling. This lack of knowledge would not excuse one who actually commit-

ted the overt act, *United States v. Miller*, ... F. (2) ... (C. A. 7, 1967), 36 U. S. L. Week 2005; see also *United States v. Hawthorne*, 356 F. (2) 740, 742 (C. A. 4, 1966), *cert. den.* 384 U. S. 908; *United States v. Gris*, 247 F. (2) 860, 864 (C. A. 2, 1957), nor would it excuse copartners who reasonably could be expected to know of the commission of the forbidden acts by their copartner.

We construe the government's position to be, virtually, that all partners in one illegal activity—here a gambling establishment offensive to state law—will be criminally responsible for the conduct of any copartner which offends another criminal statute—here a federal one—even though such criminal conduct was not shown to be necessary or usual to the partnership or known to the copartners. We are not dealing with a civil rule which holds generally that all partners are bound by the acts of any copartners done within the apparent scope of authority to serve partnership purposes. It might aid the financial success of an illegal gambling enterprise for a managing partner to steal the purse of a patron, to bribe a police officer, or to falsify the tax reports of the partnership; but we do not believe that all copartners could be prosecuted for such crimes if they had no knowledge of them, and had not conspired to bring them about, even though their commission may have served, but was no part of, the objectives of or the motivation for the admittedly illegal partnership enterprise.

We consider that *Twitchell v. United States*, 313 F. (2) 425 (C. A. 9, 1963), supports the view we express. In that case violations of a federal statute—the Mann Act (18 U. S. C., Section 2421, Section 2422)—were charged as the object of a conspiracy between a venal sheriff and the operators of several houses of prostitution. The operation of the houses of prostitution and the protection of them by the sheriff in exchange for "pay-offs" was clearly violative of state law. There was evidence also that one

or more of the alleged conspirators had transported or procured the transportation in interstate commerce of girls to work in the houses of prostitution.

There was no question but that there was a conspiracy, to which the sheriff was a party, to violate state law. In considering whether the evidence was sufficient to establish *by inference* that the sheriff knew that illegal transportation was a part of the conspiracy to which he agreed, the Court said,

> "It is not a violation of that Act [the Mann Act] to employ, in a house of prostitution; women who have come from other states of their own accord, even if their purpose in coming was to indulge in prostitution. (See McGuire v. United States, 8 Cir., 1945, 152 F. 2d 577, 579-580). Thus proof, *of which there is a circumstantial modicum in this case,* that Twitchell knew that some of the girls in the houses that he was protecting came from out of state, is not enough." 313 F. (2) at 429. (Emphasis supplied.)

and then went on to assert the sort of proof necessary to bring the sheriff Twitchell into a conspiracy to violate federal law.

> "We think that, in a case of this kind, the evidence must show in relation to Twitchell that either:
>
> "1. he *directly* agreed to the illegal interstate transportation, or *directly* agreed to a scheme which could not be consummated without illegal interstate transportation, or *directly* agreed to a scheme in which it was known that the likelihood of illegal interstate transportation was *great* (it being understood that such agreement need not be overt, and may be inferred from circumstantial evidence; and that directness refers not to face-to-face dealings, but to the extent of his knowledge of the purpose and scope of the conspiracy); *or*

"2. he evidenced his indirect agreement by substantial participation in the scheme with *actual knowledge* of the proposed, or completed, illegal interstate transportation." *Ibid.* (Emphasis in original.)

After reviewing the government's evidence the Ninth Circuit went on to say:

"We are of the opinion * * * that this evidence is not sufficient, however great a *suspicion* as to Twitchell's knowledge it may raise, to constitute *proof* of the offense here involved. The basic conspiracy, which the government spent a great deal of time proving, was not a conspiracy to commit federal offenses, with which Twitchell was charged. Some of the coconspirators may have intended to import out of state girls, and may have done so. But the basic conspiracy could have been carried out without these activities, and we do not think that the evidence sufficiently ties Twitchell in with a participation in, or a knowledge of or a purpose to commit the federal offenses that must be shown to be an object of the conspiracy." *Ibid.* (Emphasis in original.)

The conviction of the sheriff was reversed. The case is relevant here. *See also Ingram v. United States,* 360 U. S. 672, 677-678 (1959).

We think, that while presumption of innocence and the government's burden to prove intentional criminal conduct beyond a reasonable doubt must primarily be guides to the fact finders, we do not ignore these great commands in weighing the sufficiency of the evidence to permit a jury to pass upon the guilt of an accused. Whatever suspicions or speculations might be indulged that the Uptown Club was in fact part of "the syndicate," the destruction of which was part of the Congressional purpose in enacting the Federal Travel Act, and that Carney and Washer knew of and conspired in the illegal doings

of Barnes, such suspicions, speculation and surmise are not sufficient to sustain their conviction. *United States v. Berkley, supra,* 288 F. (2) at 717. In *United States v. Dunn,* 299 F. (2) 548, 554-55 (C. A. 6, 1962) we had occasion to say:

> "The additional evidence against Dunn might well arouse suspicion and support a speculative conclusion of his guilt. Indeed it might lead to sophisticated surmise that he was the inspiration of the claimed criminal plan. Such speculation, however, is not sufficient to sustain a judgment of conviction. United States v. Berkley, 288 F. 2d 713, 718 (C. A. 6, 1961); Moore v. United States, 271 F. 2d 564, 568 (C. A. 4, 1959); Guevara v. United States, 242 F. 2d 745, 747 (C. A. 5, 1958); Wise v. United States, 241 F. 2d 545, 547 (C. A. 5, 1957)."

We reverse the convictions of Carney and Washer under the conspiracy and substantive counts. We likewise reverse the conviction of Barnes under Count I, the conspiracy charge; Barnes could not be convicted of conspiring with himself to violate the Act, and there was no attempt to prove that he conspired with anyone other than Washer and Carney. Relevant, however, to the appeal of Barnes, we must consider the following:

II. Prejudicial publicity and argument.

During the progress of the trial the District Attorney sought to introduce testimony of a witness named Gallico, a New Yorker, who allegedly cashed a check at the Uptown Club in August, 1965, a date eight months subsequent to the events charged in the indictment. The District Judge, after objection and some colloquy, excused the jury and further discussion was had in their absence. Ultimately the government withdrew the proffered Gallico testimony for presentation at that time. There followed, however, newspaper and T. V. announcements of what

went on outside the presence of the jury. The Nashville Banner under large lead headlines "Witness is 'Surprise'," "Special Session Ordered," and "Gambling Case Continuing," reported in part as follows:

"Federal District Judge William E. Miller was to conduct an extraordinary afternoon session today to hear the testimony of a government witness who allegedly gave a false statement to FBI agents concerning gambling activities at the Uptown Dinner Club in Printers Alley.

"The session, requested by U. S. Atty. James F. Neal, was to begin at 2:30 p. m. with the testimony of Al Gallico of New York.

"Neal, chief prosecutor in the interstate gambling trial of the club's three operators, said, *'This man is frightened . . . and needs to return home.'*

"Attorneys for James F. Barnes, James T. Washer and Robert Carney vigorously objected to the session and asked for an overnight adjournment to 'research this issue and confer with our clients.'

* * * * * * * *

"The prosecutor said, 'We will prove by this witness that he gambled on August 11, 1965 at the Uptown Club and lost some money. He wrote a check on an out-of-state bank to get money to cover his gambling losses.

"The witness will testify that one of these defendants endorsed this check with the name of James Swor —*a mysterious, false name.'*

"Neal, questioned by the defense as to the identity of the defendant, replied, 'Well, I'll tell you then, it's Mr. Carney.'

"This was the first time in the two-day trial that Carney's name has been mentioned in connection with cashing of checks at the club. *The name of Barnes has appeared on other checks written on out-of-state*

banks at the establishment, according to Neal." (Emphasis supplied.)

Nashville television station WLAC-TV also gave its report of the doings on the day of the Gallico affair, and the next morning the Nashville Tennessean ran a shorter and less colorful account thereof.

When the trial resumed counsel for defendants moved for a mistrial. The motion was denied. The District Judge questioned the jurors as a group and three of them told of having read the newspaper accounts or heard the telecast, but gave assurances that they would not be affected thereby. It should be mentioned that the jurors were allowed to return to their homes each night and, prior to the publicity of the Gallico incident, no admonition had been given to them to refrain from reading newspapers or watching television coverage of the trial.

The claim of prejudicial argument arises from the following: None of the defendants took the stand nor presented any evidence in their own behalf. At the beginning of the District Attorney's argument to the jury, he included the observation that:

"* * * the defense counsel may argue at great length, because they rested, of course, without calling a witness."

Upon objection, the District Judge forbade further comments of this nature and instructed the jury to disregard the statement and to draw no inferences therefrom, and emphasized that the defendants had the right not to call any witnesses. Defendants' motion for mistrial was denied.

All the defendants charge that a new trial should be granted, relying primarily on *Sheppard v. Maxwell*, 384 U. S. 333 (1966), and *Marshall v. United States*, 360 U. S.

310, 3 L. Ed. 1250 (1959), as to the newspaper and TV publicity, and upon *Stewart v. United States*, 366 U. S. 1, 6 L. Ed. (2) 84 (1961), as to the prosecutor's reference to the defendants' failure to put in any evidence. Arguing that each of these matters were sufficient to call for a new trial, they insist that in any event, taken together, they require such a ruling. *United States v. Ornstein*, 355 F. (2) 222, 225 (C. A. 6, 1966).

Inasmuch as we are directing judgments of acquittal as to Carney and Washer, consideration of the present questions is not necessary as to them. We consider these issues only as to appellant Barnes. The allegedly prejudicial publicity and argument here relied upon cannot be compared in magnitude and kind with what was considered in *Sheppard, Marshall* or *Stewart, supra.* But we believe we do not need to discuss the reach of these decisions in the case before us. We are not persuaded that the described events prejudiced or affected substantial rights of appellant Barnes, Error, if there was such in denial of mistrial, was harmless. Rule 52 (a), F. R. Crim. P. While generally we do not consider the guilt or innocence of an accused in assessing allegations of constitutional deprivation, *United States v. Vida*, 370 F. (2) 759, 764 (C. A. 6, 1966), we think that in the situation here we are at liberty to consider the uncontroverted evidence presented against Barnes in determining whether he was hurt by the events under discussion. There can be no dispute but that he violated the Federal Travel Act by ordering the gambling devices from outstate sources, and by endorsing and presumably cashing checks drawn on out of state banks. We are confident that we are able to declare, "beyond a reasonable doubt," that the asserted errors, if they were such, were harmless in nature. *Chapman v. California*, 386 U. S. 18, 24 (1967).

III. Separation of jurors during deliberations.

There was no objection to the trial judge's decision to allow the jurors, during their deliberations, to separate overnight and return home. Without commenting on the merits of the rule expressed in the Seventh Circuit, see *United States v. D'Antonio*, 342 F. (2) 667 (C. A. 7, 1965) and *United States v. Panczko*, 353 F. (2) 676 (C. A. 7, 1965), *cert. den.* 383 U. S. 935, we will not, in the circumstances before us, employ Rule 52 (b), F. R. Crim. P., to find plain error in the trial judge's conduct.

IV. Constitutionality of Travel Act.

In *United States v. Compton*, 365 F. (2) 1, 3 (C. A. 6, 1966), *cert. den.* 385 U. S. 956, we sustained the constitutionality of the Travel Act. We are not persuaded to here depart from that holding.

The convictions of all defendants under count one, the conspiracy count, is reversed and a judgment of acquittal directed; the convictions of Carney and Washer on the substantive offenses charged in counts two, five, six, seven, eight, nine, ten, twelve, thirteen and fifteen are set aside with direction to enter judgment of acquittal as to them. The judgment of conviction of J. F. Barnes as to all counts except count one is affirmed.

Edwards, Circuit Judge, concurring in part and dissenting in part.

I concur with the opinion of the court for the reasons stated therein, with the exception of the reversal of the conspiracy counts. As to the conspiracy counts, I would affirm all three convictions.

The three defendants were partners in the operation of a large illegal gambling enterprise in Nashville, Tennessee, for thirteen years. While defendant Barnes was the manager, the testimony clearly shows that when he was absent, defendants Washer and Carney substituted for him

as acting manager. Defendant Carney had an apartment on the premises. We do not need to decide whether these facts alone were sufficient to allow a jury to infer that defendants Washer and Carney knew or should have known that the gambling partnership through manager Barnes was purchasing gambling supplies and cashing checks in interstate commerce in violation of the Interstate Travel Act, 18 U. S. C., § 1952.

Defendant Washer had also participated with Barnes in setting up a savings account which served for ten years as a guarantee for checks cashed by the gambling partnership. Defendants Washer and Carney from time to time as acting managers cashed checks for patrons of the gambling club.

The prosecution proved that two checks were cashed in interstate commerce by Barnes while the check cashing guarantee was in existence. The evidence discloses no limitation on the use of the guarantee. Washer and Carney were not shown to have specific knowledge of these two checks.

On these facts I believe the jury had the right to view Barnes as a fully authorized agent of defendants Washer and Carney in cashing the two checks and to find that all three had knowingly engaged in a conspiracy (See 18 U. S. C., § 371) to violate the Interstate Travel Act.

Barnes' illegal acts in cashing the two interstate checks were wholly natural and foreseeable acts which defendants Washer and Carney were bound to anticipate under the circumstances which they had joined in creating. *Pereira v. United States*, 347 U. S. 1 (1954); *Pinkerton v. United States*, 328 U. S. 640 (1946).

In *Pinkerton* the Court said:

> "It is settled that 'an overt act of one partner may be the act of all without any new agreement spe-

cifically directed to that act.' *United States v. Kissel,* 218 U. S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg v. United States,* 163 U. S. 632, 657-658." *Pinkerton v. United States,* 328 U. S. 640, 646-647 (1946).

In *Blumenthal v. United States,* the United States Supreme Court said concerning the evidence required to support a conspiracy conviction:

"Secrecy and concealment are essential features of successful conspiracy. The more completely they are achieved, the more successful the crime. Hence the law rightly gives room for allowing the conviction of those discovered upon showing sufficiently the essential nature of the plan and their connections with it, without requiring evidence of knowledge of all its details or of the participation of others. Otherwise the difficulties, not only of discovery, but of certainty in proof and of correlating proof with pleading would become insuperable, and conspirators would go free by their very ingenuity." *Blumenthal v. United States,* 332 U. S. 539 (1947) (Footnote omitted).

APPENDIX B.

The Nashville Banner.

Tuesday Afternoon, November 16, 1965.

Witness Is 'Surprise.'

Special Session Ordered.

Gambling Case Continuing.

By Craig Ellis.

Federal District Judge William E. Miller was to conduct an extraordinary afternoon session today to hear the testimony of a government witness who allegedly gave a false statement to FBI agents concerning gambling activities at the Uptown Dinner Club in Printers Alley.

The session, requested by U. S. Atty. James F. Neal, was to begin at 2:30 p. m. with the testimony of Al Gallico of New York.

Neal, chief prosecutor in the interstate gambling trial of the club's three operators, said, "This man is frightened . . . and needs to return home."

Attorneys for James F. Barnes, James T. Washer and Robert Carney vigorously objected to the session and asked for an overnight adjournment to "research this issue and confer with our clients."

Jack Norman, Sr., one of four defense lawyers, said, "We must go over this man's statement to the FBI so we will be in a position to cross-examine him."

Neal said, "Mr. Norman, that statement is false and is contrary to what he will testify to this afternoon. I have just been told by him that the facts in the statement are not true."

Neal declined to release contents of the statement or to comment on it until their disclosure.

Norman, apparently surprised by the disclosure from the government attorney, said, "Well, then, what do you plan to prove by him?"

The prosecutor said, "We will prove by this witness that he gambled on August 11, 1965 at the Uptown Club and lost some money. He wrote a check on an out-of-state bank to get money to cover his gambling losses.

"The witness will testify that one of these defendants endorsed this check with the name of James Swor—a mysterious, false name."

Neal, questioned by the defense as to the identity of the defendant, replied, "Well, I'll tell you then, it's Mr. Carney."

This was the first time in the two-day trial that Carney's name has been mentioned in connection with cashing of checks at the club. The name of Barnes has appeared on other checks written on out-of-state banks at the establishment, according to Neal.

The Nashville Tennessean,
Wednesday Morning, November 17, 1965.

Neal was not allowed, however, to call a witness identified as Al Gallaco of New York in an apparent attempt to show that Gallaco lost money gambling at the Uptown Club in August 1965—several months after Barnes, Carney and Washer were indicted.

Defense attorneys Jack Norman, Sr., John J. Hooker, Sr., Harris Gilbert and Harry Chitwood insisted that it would be prejudicial to the defendants to allow testimony on events outside the time period of the indictment.

In the absence of the jury, Neal maintained that Gallaco's testimony would show "a reckless disregard of the law" on the part of the defendants.

WLAC-TV News Broadcast,
November 16, 1965.

Copy

Big News WLAC-TV
10 P. M.

Gambling Court Trial
11-16-65

Live Anner: (Rvs) Courthouse — The Interstate Gambling Trial of Three Nashville Men Who U. S. Attorney James Neal Say Have Operated a Las Vegas Type Gambling House for Years in This City, Was Thrown Slightly Into a Turmoil Today, When Neal Requested That the Testimony of

Rvs Miller — a Witness Be Revealed to Judge William E. Miller in an Extraordinary Session. Defense Attorneys for James F. Barnes, James T. Washer and Robert Carney, Operators of Printer Alley's Uptown Dinner Club Objected . . . Judge Miller Became Reluctant and the Government Withdrew Al Gallico of

Neal Rvs — New York as a Witness. Gallico, According to Neal May Be Used as a Rebuttal Witness Later in the Court Proceedings. Neal Said Gallico's Testimony Would Prove He Gambled at the Club in August of 1965, Some Six Months after Indictments Had Been Returned Against the Trio by the Federal Grand Jury. Neal Said the Witness Had Become Frightened and Needed to Return Home.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 786

J. F. BARNES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1967. The petition for a writ of certiorari was filed on November 4, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1952 is unconstitutionally vague and restrictive of interstate travel.

2. Whether the district court abused its discretion in failing to grant two motions for a mistrial.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

STATEMENT

Petitioner and two others were convicted by a jury, in the United States District Court for the Middle District of Tennessee, under eleven counts of a seventeen-count indictment charging that they conspired to use, and did use, the facilities of interstate commerce to carry on the operation of a gambling establishment illegal under State law (1) by having dice shipped into the State by common carrier and (2) by cashing checks which would have to be mailed to out-of-state drawee banks for collection, in violation of 18 U.S.C. 1952 and 371. On January 14, 1966, petitioner was fined $2,000 and was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals reversed the convictions of all three defendants on the conspiracy count, and reversed the convictions of the co-defendants, but not of petitioner, on the substantive counts.

1. The evidence, petitioner acknowledges, was "substantial and material" (Pet. 4). It showed that from 1952 to January 1965 petitioner and two partners, his co-defendants at trial, operated an illegal gambling business known as the Uptown Club in Nashville, Tennessee. Petitioner was the managing partner of the business. In operating the club, he ordered shipments of dice from firms outside the State, and cashed and endorsed patron's checks on out-of-state banks.

2. On the morning of the third day of trial, the defense moved for a mistrial on the ground that two newspapers and a television news broadcast had carried an item about a matter which had taken place

outside the presence of the jury relating to potential testimony by a witness that he had gambled at the club several months after the indictment (Tr. 245-246; see Pet. App. B 33-35). Examination of the jurors disclosed that only three jurors had seen any of the items in question. One had "read a portion" of one newspaper article (Tr. 264-265). Another had seen the television newscast and had "just glanced over" the other newspaper article but "didn't read it all" (Tr. 264). A third had seen the television newscast but did not recall what had been said (Tr. 265-266). The jurors assured the court that they had not formed any opinion as a result of what they had seen and read, and that they had not discussed the matter with any other juror (Tr. 264-268). The court, out of the presence of the jury, stated to counsel (Tr. 269):

> I could do this now, I could excuse [the two jurors who had seen the newspaper accounts] and that would leave only the man who saw the TV program on the air. They hadn't discussed it with each other in any way.

Government counsel stated that he saw no necessity for the procedure but had no objection to it. When the court then asked the three defense counsel what their preference was on this matter, counsel conferred and then stated (Tr. 269):

> The defendants do not insist that Your Honor discharge any member of the jury on account of what has taken place.

The court then called in the jury, and expressly charged that its verdict must be based exclusively on

the evidence presented in the courtroom (Tr. 270). A similar admonition was repeated later in the court's general instructions (Tr. 357).

3. In the course of his summation to the jury, the government attorney stated (Tr. 318):

> I'm not going to spend much time in argument. I'm going to let the government's case speak from the witnesses who have been here, and from the documents. There's not much reason for the government in this case to argue at great lengths. Now the defense counsel may argue at great lengths, because they rested, of course, without calling a witness, but—

Counsel for petitioner objected to the foregoing argument and counsel for one of the co-defendants made a motion for a mistrial (Tr. 318). The court instructed the jury (Tr. 318):

> * * * The jury will disregard the statement. The Defendant has a right not to call any witnesses, and there is a presumption of [his] innocence at all times.

The court added (Tr. 319):

> * * * In other words, no inference will be drawn against the defendants by reason of the statement made by the United States Attorney.

Thereafter, in the general charge to the jury, the court instructed on the presumption of innocence and the burden of proof (Tr. 337-338), and stated (Tr. 341):

> Now the defendants in this case elected not to take the witness stand, and this is their privilege.

> The law gives a defendant or defendants in a criminal prosecution the right not to offer any evidence or to take the witness stand themselves. This is a constitutional privilege, and no inference is to be made or indulged against them in any way whatsoever by reason of the fact that they saw fit to elect to exercise this privilege, that is, not to take the witness stand and not to offer evidence.

ARGUMENT

1. There is no merit in petitioner's assertions that 18 U.S.C. 1952 fails to give adequate notice of the nature of the conduct prohibited, and that it unlawfully restricts the freedom of interstate travel, in violation of the Constitution. The various courts of appeals have repeatedly and uniformly upheld the constitutionality of the statute against attacks on these specific grounds. *United States* v. *Barrow*, 363 F. 2d 62, 65 (C.A. 3), certiorari denied, 385 U.S. 1001; *Marshall* v. *United States*, 355 F. 2d 999, 1003 (C.A. 9), certiorari denied, 385 U.S. 815; *United States* v. *Zizzo*, 338 F. 2d 577, 579 (C.A. 7), certiorari denied, 381 U.S. 915; *Turf Center, Inc.* v. *United States*, 325 F. 2d 793, 795-796 (C.A. 9); *Bass* v. *United States*, 324 F. 2d 168, 172-173 (C.A. 8); see also *United States* v. *Compton*, 365 F. 2d 1, 3 (C.A. 6), certiorari denied, 385 U.S. 956.[1] No conflict of decisions thus

[1] Section 1952 "embraces commonly understood words and prescribes a clear standard" (*Bass* v. *United States*, *supra*, 324 F.2d at 173); it infringes no right of lawful interstate travel, for it proscribes only travel in or use of interstate commerce in connection with certain specifically denominated unlawful activities (*supra*, p. 2).

exists and, in light of this overwhelming contrary authority, petitioner's contentions in this regard border on the frivolous.

2. There was no abuse of discretion in the district court's failure to grant the two motions for a mistrial. In regard to the allegedly prejudicial publicity, it became apparent during the course of the hearing and the examination of the jury that the newspaper and television items were innocuous in nature (see Pet. App. B 33-35), and that the exposure of the jurors was minimal and of no significant effect (see *supra*, p. 4). All three defense counsel thereafter permitted the original motion for a mistrial to pass without a ruling and apprised the court that they found no necessity for discharging "any member of the jury on account of what has taken place" (Tr. 269).

In regard to the argument of the government attorney, the reference to "the defense counsel [having] rested * * * without calling a witness" was plainly not a comment designed to suggest that an improper inference be drawn from the defendants' election not to testify; nor was it likely to be taken as such. In context, the statement was a part of the government attorney's explanation of the proposed brevity of his argument in relation to the probable length of the forthcoming arguments of the defense counsel who had not revealed their line of defense through the presentation of evidence. In any event, the trial court cured any possible misinterpretation by instructing the jury to disregard the statement and to draw no inference of any kind from the failure of the defend-

ants to take the stand or to present other evidence (Tr. 318-319, 341). See *Sterling* v. *United States*, 333 F. 2d 443, 446-450 (C.A. 9), certiorari denied, 379 U.S. 933; *United States* v. *Wright*, 309 F. 2d 735, 738-739 (C.A. 7), certiorari denied, 372 U.S. 929; *Knowles* v. *United States*, 224 F. 2d 168, 170 (C.A. 10).[2]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RONALD L. GAINER,
Attorneys.

DECEMBER 1967.

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[2] As noted by the court of appeals, petitioner's reliance on *Sheppard* v. *Maxwell*, 384 U.S. 333, *Marshall* v. *United States*, 360 U.S. 310, and *Stewart* v. *United States*, 366 U.S. 1 (Pet. 9-12), is misplaced, for "[t]he allegedly prejudicial publicity and argument here relied upon cannot be compared in magnitude and kind with what was considered in *Sheppard*, *Marshall* or *Stewart* * * *" (Pet. App. 29). Moreover, as the court below stated, "* * * the asserted errors, if they were such, were harmless in nature," citing *Chapman* v. *California*, 386 U.S. 18 (*ibid.*).

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